BEFORE THE

Secretary of the Interior.

IN THE MATTER OF THE CIRCULAR ORDER, No. 601, OF THE COMMISSIONER OF INDIAN AFFAIRS, OF JANUARY 27, 1912.

Respecting Religious Garb and Insignia in Government Indian Schools.

REPLY BRIEF OF HENRY B. F. MACFARLAND, COUNSEL.

Approved: April 13, 1912.

THE HOME MISSIONS COUNCIL,
By Charles L. Thompson, President.

THE INDIAN RIGHTS ASSOCIATION,
By M. K. Sniffen, Secretary.

THE FEDERAL COUNCIL OF THE CHURCHES OF CHRIST IN AMERICA,
By E. B. Sanford, Secretary.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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The Order in Question.

Circular order No. 601, January 27, 1912, is as follows:

"To Superintendents in Charge of Indian Schools:

"In accordance with that essential principle in our national life—the separation of Church and State—as applied by me to the Indian Service, which as to ceremones and exercises is now being enforced under the existing religious regulations, I find it necessary to

issue this order supplementary to those regulations, to cover the use at those exercises and at other times, of insignia and garb as used by various denominations. At exercises of any particular denomination there is, of course, no restriction in this respect, but at the general assembly exercises and in the public school rooms, or on the grounds when on duty, insignia or garb has no justification.

"In Government schools all insignia of any denomination must be removed from all public rooms, and members of any denomination wearing distinctive garb should leave such garb off while engaged at lay duties as Government employees. If any case exists where such an employee cannot conscientiously do this, he will be given a reasonable time, not to extend, however, beyond the opening of the next school year after the date of this order, to make arrangements for employment elsewhere than in Federal Indian Schools.

"Respectfully,
(Signed) "ROBERT G. VALENTINE,
"Commissioner."

Action of the President.

On February 3, 1912, the President wrote the Secretary of the Interior as follows:

"My dear Mr. Secretary:

"It has been brought to my attention that an order has been issued by the Commissioner of Indian Affairs supplementing the existing religious regulations in respect to the Indian schools. This order relates to the general matter which you and I have had under consideration and concerning which, at your request, the Commissioner was collecting detailed information for our advice. The Commissioner's order has been made without consultation either with you or with me. It not only prohibits the use of distinctive religious insignia at school exercises, but also the wearing of distinctive religious garb by school employees, and provides that if any school employee cannot conscientious-

ly comply with the order, such employee will be given a reasonable time, not to extend, however, beyond the opening of the next school year, to make arrangements for employment elsewhere than in Federal Indian schools. I fully believe in the principle of the separation of the Church and State on which our Government is based, but the questions presented by this order are of great importance and delicacy. They arise out of the fact that the Government has for a considerable period taken over for the use of the Indians certain schools theretofore belonging to and conducted by distinctive religious societies or churches. As a part of the arrangements then made the school employees who were in certain cases members of religious orders, wearing the distinctive garb of these orders, were continued as teachers by the Government, and by ruling of the Civil Service Commission or by executive action they have been included in the classified service under the protection of the civil service law. The Commissioner's order almost necessarily amounts to a discharge from the Federal Service of those who have thus entered it. This should not be done without a careful consideration of all phases of the matter, nor without giving the persons directly affected an opportunity to be heard. As the order would not in any event take effect until the beginning of the next school year, I direct that it be revoked and that action by the Commissioner of Indian Affairs in respect thereto be suspended until such time as will permit a full hearing to be given to all parties in interest and a conclusion to be reached in respect to the matter after full deliberation.

"Sincerely yours,
(Signed) "WILLIAM H. TAFT."

The Hearing Before the Secretary of the Interior.

The hearing referred to in the President's letter was held by the Secretary of the Interior, on April 8, 1912, from half past ten until half past five o'clock with an hour's re-

cess, at which time representatives of the Home Missions Council, the Indian Rights Association, the Federal Council of Churches, and of the Bureau of Catholic Indian Missions as well as others, were patiently and courteously heard by the Secretary of the Interior.

At this hearing a printed brief by Charles J. Bonaparte, general counsel of the Bureau of Catholic Indian Missions, was presented by the director of that Bureau, Rev. William H. Ketcham, who on the following day furnished copies of it to the undersigned.

The Fundamental Legal Principle.

Replying to the brief of Mr. Bonaparte, the logical order of consideration seems to us to require that we should first state the fundamental legal principle involved, as does President Taft in his letter to Secretary Fisher when he says, *"I fully believe in the principle of separation of the Church and State on which our Government is based,* but the questions presented by this order are of great importance and delicacy." (Italics ours.)

This is not simply a philosophical principle of politics, but a binding principle of law. It is expressed in Article I of the amendments of the Constitution of the United States as follows:

> "Congress shall make no law respecting an establishment of religion, prohibiting the free exercise thereof; * * * ."

(The rest of the article refers to other subjects.)

This is binding not only upon Congress, but upon all the agents of the Government in the execution of the laws enacted by Congress, including appropriations of money. All the officers of Government have taken an oath to sup-

port and execute the Constitution and its principles are mandatory upon them. Familiarity with the Constitution should not breed contempt for it, or cause public officers to think lightly of its principles.

This is especially true of the principle involved in this matter whose application and importance have received the testimony not only of our own courts and jurists, but of competent authorities of other countries, the "present posterity" of Bacon, from DeToqueville to Bryce.

Mr. Justice Field, in delivering the unanimous opinion of the Supreme Court in Davis v. Beason, 133 U. S., 333, states the accepted doctrine in the following words:

> "The first amendment to the Constitution, in declaring that Congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, was intended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relation to his Maker and the duties that imposes as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of religion as he may think proper not injurious to the equal rights of others, *and to prohibit legislation for the support of any religious tenets, or the modes of religion of any sect.*" (Italics ours.)

Not to multiply citations we refer only to one other case in the Supreme Court, Reynolds v. U. S., 98 U. S., 162; and out of the many commentaries we cite only those of Story, section 1879 of his Commentaries on the Constitution; Von Holst, Constitutional Law, section 74; Bryce, American Commonwealth, Vol. 2, Chap. CII, p. 570.

We adopt the quotation made by the Commissioner of Indian Affairs in his statement at the hearing before the Secretary of the Interior from the instructions given by the Secretary of War (Mr. Elihu Root) to the governor of the

Philippines (Mr. William H. Taft) in 1904 respecting the settlement of the question with the Vatican as to the Friars lands in the Philippines, as follows:

> "One of the controlling principles of our government is the complete separation of Church and State, with the entire freedom of each from any control or interference by the other. *This principle is imperative* wherever American jurisdiction extends, and *no modification or shading thereof can be a subject of discussion.*" (Italics ours.)

We dwell upon this principle because in the printed brief, and in the argument, of the opponents of circular order No. 601, attempt has been made to minimize its importance and application, because it was seen that it was decisive of the case under consideration. And the opinion of the Supreme Court in Quick Bear v. Leupp, 210 U. S., 50, was so quoted as to make the impression that it departed from the Constitutional principle involved, and the uniform doctrine of the Supreme Court.

The Application of the Principle.

A.

Circular order No. 601, in terms, deals *only* with *"Government schools,"* and *"Government employees,"* while engaged in their *official duties* in such schools. It has nothing to do with the schools belonging to any church, whether entirely supported by that church, or wholly, or in part, by the Indians whose children are in the schools by the use of money belonging to Indians either directly, or through their trustee, the United States. The issue ought not to be obscured by the fog of questions not involved in it.

We must repeat, with emphasis, that our contention is that in Government schools Government employees while on duty should not wear a sectarian garb, or exhibit sectarian insignia, because it is a violation of the Constitution of the United States so to do. Such action on their part as the agents of Congress establishes *pro tanto* not only religion in general, but a particular form of religion in a strictly Governmental institution in execution of legislation by Congress. It takes a Government building, Government facilities, Government time for the teaching of a religion by Government employees enrolled in the Civil Service of the United States, paid by the Government from Government funds raised by general taxation of the whole citizenship, supplemented in some cases by money appropriated by the Government for the general benefit of the Indians, but wholly within the authority and discretion of the Government. All this is done under the American flag typifying the sovereign authority of the whole people through their Government. The attempt in the argument to make this seem a small matter is the natural resort of those who are hard pressed. It is obvious that no such violation of the Constitution can be considered a small matter. Even if it was not carried on as it is in a number of Government schools, by a number of Government employees, at widely scattered places throughout a large portion of the United States, even if it were confined to one Government school, it would still be necessary to root it out in order to vindicate the Constitution, and prevent a larger encroachment upon the liberties of the people. All history shows that such encroachments always begin in a small way, and if not checked spread. But the present practice is not confined to one school or to a few places. As the facts stated at the hearing show it is of large extent and importance. The mere resistance to circular order No. 601 evidenecs this fact.

The obvious analogy to the Government Indian schools is found in our public schools. In the national capital the public school system is directly under the authority of the Congress of the United States. Suppose that the Board of Education of the District of Columbia, an agent of Congress, should take over a sectarian private school with its officers and teachers and they should continue to wear during their school duties, their sectarian garb and insignia, and exhibit sectarian insignia upon the public school room walls, does anyone suppose that Congress would permit such a practice to continue? Does anyone suppose that if the question were taken to the courts it would be allowed to continue? No one has any such idea. This suggests the touchstone in the present case. It is this, can Congress through its agents establish a religion, *pro tanto,* in a Government school without violating the Constitution of the United States? There can be but one answer to this question. Neither Congress nor its agents can do so, and all are equally bound to prevent such a thing from being done, or, when it is brought to notice, continued.

B.

This brief deals only with the law of the case, and, therefore, in its view it matters not whether the Government employees in the Government schools affected by circular order No. 601, wear the garb and insignia of the Roman Catholic Church, or of the Protestant Episcopal Church, or of the Salvation Army, or of the Society of Friends, or of any other religious sect. But it is proper to maintain as so well stated by the Court of Appeals of New York in the case of O'Connor v. Hendrick, 184 N. Y., 421 (page 428), that "the effect of the costume worn at all times in the presence of the pupils would be to inspire respect if not sympathy with the religious denomination to which they

belong. To this extent the influence was sectarian even if it did not amount to the teaching of denominational doctrine."

That opinion further quotes with approval from a dissenting opinion of Justice Williams in the case of Hysong v. School District (164 Pa. St., 629, 654), in which he says the teachers "come into the schools not as common school teachers or as civilians, but as the representatives of a particular order in a particular church whose lives have been dedicated to religious work under the direction of that church. Now the point of the objection is not that their religion disqualifies them. It does not. Nor is it thought that church membership disqualifies them. It does not. It is not that holding an ecclesiastical office or position disqualifies, for it does not. It is the introduction into the schools as teachers of persons who are by their striking and distinctive ecclesiastical robes necessarily and constantly asserting their membership in a particular church, and in a religious order within that church, and the subjection of their lives to the direction and control of its officers."

This presents accurately the reasoning as to the wearing of a religious garb and the exhibition of religious insignia in such a case. It would not apply, obviously, to concealed insignia, or even to small objects worn inconspicuously, with ordinary clothes, as for example, a watch charm or pin.

In view of the citation in the brief and argument of our opponents of Hysong v. School District as "the leading case" on this subject, as against the later case in the Court of Appeals of New York, O'Connor v. Hendrick, wherein the judges were unanimous in support of the principle for which we contend, it is necessary for us to state not only that the New York decision is now generally regarded as the leading case, but also that the Supreme Court of Pennsyl-

vania in a subsequent decision, Commonwealth v. Herr, 229 Penn., 132, abolished the practice allowed by the decision in Hysong v. School District upholding the constitutionality of an act of the legislature passed because of that decision in which the people had declared that the sectarian garb should not be worn in their public schools. Thus, now, the position taken by the minority of the Supreme Court of Pennsylvania in Hysong v. School District and so well expressed by Mr. Justice Williams has been upheld by the people and the people's action has been sustained by the same Supreme Court which rendered the opinion in Hysong v. School District. Hysong v. School District is no longer law.

The brief of Mr. Bonaparte makes no reference to the subsequent decision in the Supreme Court of Pennsylvania. Nor did the oral argument of Mr. Edgar H. Gans.

C.

As we stated at the hearing before the Secretary of the Interior we make no objection to the wearing of *any* garb by *any* Government employee *when off duty*. Nor did, nor would, we make any objection to the appointment to service as teachers in any Government Indian School of any person found competent by the Civil Service examination no matter what his or her religion may be. We, of course, agree that any discrimination on account of religion would be as much a violation of that portion of Article I of the amendments of the Constitution upon which we rest our case as the practice which circular order No. 601, sought to abolish.

D.

The statements made both in the oral argument of Mr. Edgar H. Gans, and in the brief of Mr. Charles J. Bonaparte, make it necessary for us to ask that a careful ex-

amination be made of the entire opinion of the Supreme Court of the United States in Quick Bear v. Leupp, 210 U. S., 50, including the pleadings embodied by the court in a note, and also of the entire opinion of the same court alluded to by it in the Quick Bear opinion, namely, that in Bradfield v. Roberts, 165 U. S., 291.

It must be repeated that in neither case did the Supreme Court pass upon the question involved here. It was dealing in both cases with totally different questions. It need hardly be said that in neither case did it deny the contention which we maintain as to the constitutional principle, or its application to such a state of facts as is presented here. The Bureau of Catholic Indian Missions, the real defendant in the Quick Bear v. Leupp case, expressly disclaimed in that case any claim that public money for Government schools could be employed for any such sectarian purpose as that now protested against. See paragraph 12, answer of the defendants (quoted in the note to the opinion of the court), last clause as follows:

> "The above paragraph contains all the matter pertinent to the appropriation of public moneys for the support of education in sectarian schools. The appropriations ceased with the Indian appropriation act of 1899, have never been made since, nor is any one asking that they should be made, or that any public moneys of the United States raised by taxation should be employed for such purposes."

The Bureau of Catholic Indian Missions appears in the present case as asking what it said in that case it would not ask, and we appear as opposing any such use of the public moneys of the United States raised by taxation forbidden by the action, as well as by the declaration of Congress, whose appropriations for the support of education in sectarian schools ceased in 1899.

All that the Supreme Court decided in Quick Bear v. Leupp is that the Indians may use their own moneys for the purpose of educating their children in schools of their choice. At the same time the court expressly recognized the constitutional principle of the separation of Church and State forbidding the appropriation of public moneys for sectarian purposes in the paragraph that sums up its judgment as follows:

> "But we cannot concede the proposition that Indians cannot be allowed to use their own money to educate their children in the schools of their own choice *because the Government is necessarily undenominational, as it cannot make any law respecting an establishment of religion or prohibiting the free exercise thereof.*" (Italics ours.)

Of course, the court decided only the question that was before it, and was not called upon to make a more general statement respecting the constitutional principle involved here.

In the oral argument at the hearing before the Secretary of the Interior an erroneous impression was made (unintentionally no doubt), by another quotation by Mr. Gans from the opinion of Chief Justice Fuller in the Quick Bear case. That quotation was as follows:

> "Some reference is made to the Constitution, in respect to this contract with the Bureau of Catholic Indian Missions. It is not contended that it is unconstitutional, and it could not be. Roberts v. Bradfield, 12 App. D. C., 475; Bradford v. Roberts, 175 U. S., 291, 44 L. Ed. 168, 20 Sup. Ct. Rep., 121."

This made it necessary to ask that the opinion of the Supreme Court in Bradford v. Roberts, 175 U. S., 291, should be carefully examined. It requires no extended examina-

tion to see that that case does not pass upon the question now under consideration, or upon the application of the constitutional principle to other Governmental institutions, or even the appropriation or payment of public moneys to a religious corporation of any kind, but only upon the question of whether a corporation, namely, the Providence Hospital of the City of Washington, District of Columbia, with which the Commissioners of the District of Columbia had made a contract, was a religious corporation. The Court considered and decided no other question, as the opinion of Mr. Justice Peckham distinctly states, than the alleged sectarian character of the hospital, and its decision was only that it was not such an institution. As Mr. Justice Peckham says, page 297, 175 U. S.:

> "If we are to assume, for the purpose of this question only, that under this appropriation an agreement with a religious corporation of the tenor of this agreement would be invalid, as resulting indirectly in the passage of an act respecting an establishment of religion, we are unable to see that the complainant in his bill shows that the corporation is of the kind described, but on the contrary he has clearly shown that it is not."

The decisions and opinions in Quick Bear v. Leupp and Bradfield v. Roberts should therefore be dismissed from consideration in this case.

E.

We cannot agree with the suggestion made at the hearing that this matter can be properly settled by allowing the Government employees now wearing sectarian garb to continue to do so until they die, resign or are dismissed on the understanding that no new employees shall be allowed to wear the garb, and that effort shall be made to prevent per-

sons wearing the sectarian garb from taking a Civil Service examination for place in the Indian School service. It would be impracticable from a legal point of view to prohibit persons wearing the sectarian garb from taking the Civil Service examination since the Civil Service Commission is forbidden to consider either religion or politics, and those placed on the eligible lists would be entitled to appointment upon the occurrence of vacancies. However, even if no more persons wearing sectarian garb should be appointed to the Government Indian School service we could not consent to permit the continuance of the violation of the constitutional principle by those who are now in that service. Judging from the past the last of them would not have disappeared from the service for many years to come, but every day's continuance of such an one in the permanent Indian service is a day's violation of the fundamental principle of law, and should not be permitted. Moreover the number so violating the principle of the fundamental law is large, and has been increasing, instead of decreasing as might have been expected since it was expressly stated in the original Civil Service Commission order that vacancies thereafter appearing, in the schools in question, should be filled only from the eligible lists of the Civil Service Commission.

The Illegal "Covering in" Order and Practice.

1.

The Civil Service Commission order of June 6, 1895, is contained in the following letter dated June 10, 1895:

"The Secretary of the Interior:

Sir: This Commission is in receipt of your communication of June 3, 1895, requesting that the superintendents, teachers and matrons of the following con-

tract schools whose transfer to the government is pending be included in the classified service without examination by the Civil Service Commission. In an interview with the Superintendent of Indian Schools, the Commission's attention was called to the fact that certain sectarian or contract schools proposed to transfer the entire schools to the Indian Service, and the Commission agreed that these schools be treated in the same way that a post office is treated when it becomes a free delivery office, that the fact of its being a free delivery office extends the classification to that office, and as this was a condition also made by these contract schools in agreeing to the transfer, it has been ordered that the Montana Industrial School, Crow Agency, Montana, Hope School, Springfield, South Dakota, Greenville School, Greenville, California, and the Wittenberg School, Wittenberg, Wisconsin, be treated as having been brought into the classified service including such of the employees as may be reported to the Civil Service Commission. Vacancies hereafter occurring in these schools, however, will be filled from the eligible registers of the Commission.

Please inform the Commission of the names, with the positions held and dates of entry into the service of the employees at these schools treated as classified.

Very respectfully yours, etc.,

JOHN R. PROCTOR,
President, Civil Service Commission."

The distinguished counsel for our opponents apparently differ widely as to the relation of the order of the Civil Service Commission of June 6, 1895 (letter of June 10, 1895), to the question raised by the circular order No. 601. Mr. Edgar H. Gans at the hearing stated that the order of June 6, 1895 (letter of June 10, 1895), and the practice under it should not be considered as an important element in the case, and sought to minimize the argument against the legality of that order and practice. A sufficient answer to

Mr. Gans is found in the statement of the President in his letter to the Secretary of the Interior under date of February 3, 1912, in which he says:

> "They" (the questions presented by the order) "arise out of the fact that the Government has for a considerable period taken over for the use of the Indians certain schools theretofore belonging to and conducted by distinctive religious societies or churches. As a part of the arrangements then made the school employees who were in certain cases members of religious orders, wearing the distinctive garb of these orders, were continued as teachers by the Government, and by ruling of the Civil Service Commission or by executive action they have been included in the classified service under the protection of the Civil Service law. The Commissioner's order almost necessarily amounts to a discharge from the federal service of those who have thus entered it."

On the other hand, Mr. Charles J. Bonaparte, in the printed brief, evidently considers the Civil Service question important although he misapprehends its relation to this case. He says (page 7):

> "There has been some suggestion that this order with respect to garb could be justified because the original incorporation in the classified service of the teachers affected was of doubtful legality under the Civil Service Law."

No such suggestion has been made by us at any time. Nor had we heard of any such suggestion. We do contend that the order of June 6, 1895 (letter of June 10, 1895), and the practice under it were and are without warrant of law, but we do not justify the circular order No. 601 by this contention. We only say that the Civil Service

Commission order and practice afforded the persons affected no protection, either in law, or in equity, against separation from the Civil Service if they did not comply with an order forbidding them to wear sectarian garb, or display sectarian insignia, while on duty as Government employees. In this we are simply meeting the suggestion made by our opponents that the Civil Service Commission order and the practice under it gave such employees some equitable rights in the premises. It is admitted that no Government employee has a vested right, legal or equitable, in the place which he holds, and from which he may be removed at any time. Even if the persons affected by circular order No. 601 had all been legally, and properly, appointed under the Civil Service law, as the result of competitive examination and certification from the eligible lists they would not be protected from removal by their superiors in office.

As to the original suggestion which Mr. Bonaparte, with characteristic humor, makes that if the incorporation of the teachers affected in the Government Civil Service was illegal, those teachers are still mere private citizens, and therefore not subject to the orders of the Commissioner of Indian Affairs, it suffices to say that *de facto* they are Government employees so long as they draw Government pay, for doing Government work, in Government establishments under direction of Government officers. So long as they remain in such a situation they are subject to orders of the Commissioner of Indian Affairs.

2.

When Mr. Bonaparte comes to consider seriously the important question of the order of June 6, 1895 (letter of June 10, 1895), and the practice under it, which (as the President has indicated) has a close relation to circular

order No. 601, having to make the best of a bad case he is forced to take a position which causes deep regret to one who like the undersigned has followed him for many years as a leader in Civil Service reform. It excites surprise that as counsel for the Bureau of Catholic Indian Missions he would condone and even advocate an order and a practice which he would have condemned and combatted as President of the National Civil Service Reform League. For that order and that practice are absolutely opposed to the spirit and the letter of the Civil Service act, and the teachings of the National Civil Service Reform League. In a word, that order and practice have "covered in," or rather smuggled in as members of a duly classified part of the Civil Service those who had never passed the competitive examination required for the places to which they were appointed. *The principle of that order and practice was, that purely private positions in private employment, having no legal connection whatever with the Government service, could be classified as part of the Civil Service, and with their incumbents incorporated in that Civil Service.* In their operation the order and practice opened a wide back door to the Civil Service, similar to that front door of the days of the old spoils system which Civil Service reformers have been endeavoring to close, and which the Civil Service act was supposed to have closed as to the classified service. Privileged persons were under the order and practice given entrance to the Civil Service under the old aristocratic principle of favoritism, as against the new democratic principle that all comers should have equal opportunity in competitive examinations, and that the best, as shown by that test, should be appointed.

No Civil Service reformer it is believed, before the filing of the printed brief of Mr. Bonaparte in this case ever before contended that the Civil Service act of January 16,

1883, contemplated the extension of the classified service, for which it provided, *over private schools, private offices, private shops, private factories, or private employees of any kind.* The Civil Service reformers, like everybody else, have claimed that the act, as it says in plain terms, provides for the gradual extension, by the President in successive classification orders, of the Civil Service rules which the act prescribes in principle, over the Government service. This extension by classification, beginning with a small section of the Civil Service has not yet gone over the entire Governmental service. When the *classified* service is co-extensive with the *Civil Service* the ideal of the Civil Service act so far as its extent is concerned will have been realized. But the incorporation of *private* positions whether in schools or elsewhere was, of course, never contemplated by the act, or by the Civil Service reform which brought about its enactment.

The order of June 6, 1895 (letter of June 10, 1895), was adopted by a quorum of two of the Civil Service Commission, Messrs. Proctor and Harlow, neither of them a lawyer, without the advice of the attorney general or any other law officer of the Government which probably accounts for the adoption of it in the face of its obvious illegality. In the letter of June 10, 1895, from Mr. Proctor, president of the commission (a distinguished geologist), to the Secretary of the Interior, Mr. Proctor states that, in an interview with the then superintendent of Indian schools, the commission agreed, that the *private* schools to be taken over, "should be treated in the same way that a post office is treated when it becomes a free delivery office, that the fact of its being a free delivery office extends the classification to that office."

There is, of course, no analogy between the automatic inclusion of a Government post office whenever its business warrants its being made a free delivery office and the exten-

sion of the classified service over a *private* school as was attempted in the order of June 6, 1895, "covering in" four *private* schools with their then employees.

The Indian service, including all the Government schools, had been classified by the action of the President in rules which took effect March 1, 1892.

Indian Rule No. 1 provides as follows:

> "The classified Indian Service shall include all the physicians, school superintendents, assistant superintendents, school teachers, and matrons in that service, classified under the provisions of section 6 of the act to regulate the civil service of the United States, approved January 16, 1883."

Indian Rule No. 4 provides as follows:

> *"All vacancies, unless filled by promotion, transfer, or reappointment shall be filled from the eligible lists obtained by examination."* (Italics ours.)

3.

The order of June 10, 1895, was not an order made by the President of the United States, nor was it made by the Civil Service Commission by his direction nor as his organ, nor with his knowledge or consent. Nor was this a case, like the familiar one cited by Mr. Bonaparte, Marbury v. Madison, 1 Cr., p. 170, in which the "head of a department" (and the Civil Service Commission is not the "head of a department") "is the mere organ of the Executive will," as was Secretary Madison, when nothing remained for him to do, in the matter of the appointment of Mr. Marbury as a notary public in the District of Columbia, but to hand him his signed commission, under his appointment by the President of the United States. There is no record in-

dicating that the President knew anything about the Civil Service Commission order of June 6, 1895 (letter of June 10, 1895). There is no justification for the reflection upon the then President, or his successors, all of them zealously endeavoring to maintain Civil Service reform, and extend the Civil Service rules over the Civil Service as rapidly as practicable, made in the suggestions of Mr. Bonaparte's brief.

Take the present President of the United States whose efforts to extend the Civil Service rule command the admiration of all Civil Service reformers. Would it be fair to say of him that while he was thus endeavoring to protect and improve the Government service at the front door, he was knowingly allowing admission to it in violation of the spirit and letter of the Civil Service act at the back door?

But as a matter of fact and a matter of law the President would have no authority to do so if he desired. There is therefore no value whatever in the alleged conclusive inference that the illegal practice described has been carried on by the direction, and with the approval, of successive Presidents.

Mr. Bonaparte quotes on page 8 of his printed brief as the warrant for such authority in the President section 1753 of the Revised Statutes as follows:

> "The President is authorized to prescribe such regulations for the admission of persons into the Civil Service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge and ability for the branch of service into which he seeks to enter."

But he does not quote the provision in section 7 of the Civil Service act of January 16, 1883 (long subsequent, of course, in date to section 1753 U. S. R. S.) which ex-

pressly limits the authority conferred by section 1753 R. S. on the President in the provision that the Civil Service act shall not be considered to take from the President "any authority *not inconsistent with this act* provided by the seventeen hundred and fifty-third section of said statute, * * * ." (Italics ours.) Since the enactment of the Civil Service act the President has *no authority* under section 1753 R. S. *to do anything that is inconsistent with the spirit and letter of the Civil Service act,* and therefore he has no authority to authorize or direct the extension of the classified service over private positions or employments or private employees of any kind, whatsoever.

4.

Mr. Bonaparte's brief indicates that he has not made a thorough investigation of this subject. Therefore he probably does not know that the order of June 6, 1895 (letter of June 10, 1895), attempting to bring private places and their incumbents into the Civil Service has been used as a precedent for other cases than those arising in the Government Indian School service. Besides the large number of private schools which have been thus adopted with their employees (without Civil Service examination), into the Government Indian school service under the order of June 6, 1895 (letter of June 10, 1895), other places in private employment with their incumbents have been adopted into the Civil Service in each case under the precedent of the order of June 6, 1895. The first of these was on June 1, 1900, when certain assistant engineers and electricians, dynamo tenders and elevator conductors who had been employed by the contractor for heating and lighting the new post office building in Washington, D. C., during construction, were bodily

adopted into the classified service when the building was turned over to the Post Office Department on the 1st of July, 1900.

A later case is that of March 21, 1905, when Frank R. Paige and Thomas D. Fay who had been for two years master and pilot on a cutter, "H. B. Chamberlain," chartered by the Government in New York harbor for immigrant service were "covered in" to the classified service by the adoption of the private positions which they had held under the owner of the cutter "Chamberlain," and assigned to duties on a cutter called the "Immigrant," which the Government had built for its own use.

The national Civil Service Reform League has always warned national, State and municipal governments against any departure from the Civil Service reform statutes and principles objecting to such departure, however innocent it might appear at the time to be, that it would probably become a precedent for successive departures more and more dangerous. Here is a concrete illustration of the importance of such a warning in the bad results of a violation of the spirit and letter of the Civil Service act of January 16, 1883. The order of June 6, 1895, was well intended, but improvident, as well as illegal, and certain to have just the effect which it has had in practical administration because of the convenient opportunity its precedent afforded for appointing without examination to positions in the Civil Service, by law under the protection of Civil Service rules.

The theory of the application of the Civil Service rules to the Government Indian school service on March 1, 1892, is, of course, the same as that upon which the Civil Service rules are being gradually extended over the whole Civil Service, that on the whole the candidates selected by an impartial competitive examination free to all will give better service than those appointed by favoritism. The children

in the Government Indian schools are entitled to the best teaching the Government can provide. Therefore, they are entitled to teachers selected by that method which the Government itself has adopted as that most likely to furnish the best results.

5.

In justice to the United States Civil Service Commission it ought to be stated that the legality of the order and practice referred to was never brought to its attention until November 27, 1911, when it was presented in a letter from the undersigned as counsel for the Home Missions Council of the United States containing substantially the argument which is presented on this point in this brief. Up to April 12, 1912, no notice of any action by the United States Civil Service Commission upon the questions thus raised has been received. It is assumed that the Commission will act upon it favorably. It is assumed that the practice was continued because it was not previously challenged by anyone. It is assumed that if the Civil Service Commission could have established its legality it would have done so before this time.

At any rate the practice of thus "covering in" private schools or other private institutions or positions with their incumbents ought not to be continued, and it is respectfully submitted that the Secretary of the Interior and the Commissioner of Indian Affairs should not ask for the incorporation into the Civil Service of any more of such private positions with their incumbents.

6.

It is difficult to consider seriously the final proposition in the printed brief of our opponents that the question of the enforcement of a principle of the Constitution of the United

States in Government Indian Schools should be left to the decision of the Indians whose children attend a particular school. This is more remarkable than the current suggestion that judicial decisions of constitutional questions should be reversed or affirmed by a majority of the qualified voters of a State. Such a question as that in this case is to be decided either by the judiciary, the executive, or the legislature of the country since it is plainly a Governmental question under the Constitution of the United States. Even those who advocate the popular review of judicial decisions do not suggest it in connection with the decisions of the federal judiciary. It is equally strange to have it suggested that any citizen of the United States, anywhere, should not be considered a "party in interest" in a matter affecting every citizen of the United States in his Constitutional rights. Every person who pays taxes through the customs or internal revenue into the federal treasury is certainly a party in interest in this matter, and has a right, if not a duty, to protest against any violation of the Constitution in appropriation and expenditure of the federal tax money, especially when it threatents, even remotely, the indispensable separation of Church and State. Eternal vigilance is still the price of liberty.

HENRY B. F. MACFARLAND,
Counsel.

Approved: April 13, 1912.

THE HOME MISSIONS COUNCIL,
By Charles L. Thompson, President.

THE INDIAN RIGHTS ASSOCIATION,
By M. K. Sniffen, Secretary.

THE FEDERAL COUNCIL OF THE CHURCHES OF CHRIST IN AMERICA,
By E. B. Sanford, Secretary.